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No. 86-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAT S. HOLLOWAY,

Petitioner,

v.

JUDGE DEE BROWN WALKER ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ARGUMENT 1

I. RESPONDENTS' *ROOKER/FELDMAN* ARGUMENT IS AN IRRELEVANT DISTRACTION 1

II. RESPONDENTS' EFFORTS TO MAKE THIS CASE SEEM FACTUALLY OR PROCEDURALLY CONVOLUTED ARE TOTALLY EXTRANEOUS TO THE QUESTION PRESENTED 5

III. RESPONDENTS DO NOTHING TO RECONCILE THE JUDGMENT BELOW WITH A CENTURY OF FOURTEENTH AMENDMENT PRECEDENT AND WITH THIS COURT'S OWN NARROW READING OF *PARRATT* AND *HUDSON* 6

TABLE OF AUTHORITIES

Cases:

Bender v. *Williamsport Area School District*, 106 S.Ct. 1326 (1986) 4n

Carey v. *Piphus*, 435 U.S. 247 (1978) 3, 4

Davidson v. *Cannon*, 106 S.Ct. 668 (1986) 9

PAGE

Dennis v. *Sparks*, 449 U.S. 24 (1980) 2, 3, 4, 8

District of Columbia Court of Appeals v. *Feldman*, 460 U.S. 462 (1983) 1, 2, 4n

Ex parte Virginia, 100 U.S. 339 (1880) 7n

Home Telephone & Telegraph Co. v. *Los Angeles*, 227 U.S. 278 (1913) 1, 6, 7n

Hudson v. *Palmer*, 468 U.S. 517 (1984) ..... *passim*

Humble Exploration Co. v. *Browning*, 106 S.Ct. 1376 (1986) 6n

In re Murchison, 349 U.S. 133 (1955) 8n

Memphis Community School Dist. v. *Stachura*, 106 S.Ct. 2537 (1986) 3n

Mitchum v. *Foster*, 407 U.S. 225 (1972) 9

Monell v. *Dept. of Social Services*, 436 U.S. 658 (1978) 7n

Parratt v. *Taylor*, 451 U.S. 527 (1981) ..... *passim*

Rooker v. *Fidelity Trust Co.*, 263 U.S. 413 (1923) . 2, 3, 4n

Tower v. *Glover*, 467 U.S. 914 (1984) 5

Tumey v. *Ohio*, 273 U.S. 510 (1927) 8n

Ward v. *Village of Monroeville*, 409 U.S. 57 (1972) . 8n

Williamson County Regional Planning Comm'n v. *Hamilton Bank*, 105 S.Ct. 3108 (1985) 1, 7, 8

United States Constitution:

Fifth Amendment 7n

Fourteenth Amendment ..... *passim*

Federal Statutes:

42 U.S.C. § 1983 ..... *passim*

ARGUMENT

The court of appeals held that a conspiracy to produce an unfair trial cannot violate "federal constitutional guarantees" so long as the "state system *as a whole* provides due process of law." (A65) (emphasis added). Respondents concede that the court below so held, and further concede that this holding conflicts with recent holdings of at least two other circuits. Yet respondents urge that the resulting question presented by this petition is not worthy of certiorari because an alternative theory supports the Fifth Circuit's decision; because the facts do not really show any conspiracy; or because *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U.S. 278 (1913), with which the decision below also conflicts, no longer means what it meant before *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 105 S.Ct. 3108 (1985). Respondents are wrong on all three counts. "Constitutional law is . . . continuously evolving,"[1] as respondents say, but surely it is for this Court to say when its precedents have been "overruled."[2]

I. RESPONDENTS' *ROOKER/FELDMAN* ARGUMENT IS AN IRRELEVANT DISTRACTION.

The briefs in opposition contend that the questions presented by the petition are "academic"[3] and may be avoided altogether because the Fifth Circuit should have ordered dismissal of petitioner's § 1983 complaint for lack of subject matter jurisdiction under *District of Columbia Court of Appeals* v. *Feldman*,

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[1] Brief in Opposition of Respondent Wright ("Wright Br.") at 16.

[2] *Id.*

[3] Brief in Opposition of the Browning Interests and R. Jack Ayres ("Browning Br.") at 21.

460 U.S. 462 (1983), and *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923). Respondents are confused — and mistaken.[4]

Obviously, if petitioner were to ask the courts below on remand to render "a declaratory judgment that the state court judgment was void,"[5] or to vacate, set aside, or reverse that judgment, or to inquire "whether the judgment was justified based on the facts and law before Judge Walker,"[6] *Rooker/Feldman* would stand in the way. Since such relief is not available, § 1983 actions such as this and the action in *Dennis* v. *Sparks*, 449 U.S. 24 (1980), provide no route for circumventing the *Rooker/Feldman* limit on the original jurisdiction of the federal district courts, despite respondents' concern.[7] To avoid just such circumvention, the district court in this case substantially narrowed the grounds on which petitioner could proceed, holding that petitioner could not obtain a reversal of Judge Walker's rulings, or even seek to prove conspiracy merely by showing those rulings to be in error.[8] Having thus pared down petitioner's complaint, the district court "accept[ed]"

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[4] Respondents admit that the district court rejected their argument and found that it had jurisdiction to hear part of petitioner's complaint, and that the Fifth Circuit declined to address their *Rooker/Feldman* argument. Brief in Opposition of Respondent Kelsoe ("Kelsoe Br.") at 9 n.3; Browning Br. at 11. Nevertheless, respondents make strange claims that this issue was somehow decided in their favor by the district court below, *see* Wright Br. at 8, 9; Kelsoe Br. at 7, and even by the Fifth Circuit — the latter, supposedly, while the Fifth Circuit was making a ruling in a different case. *See* Kelsoe Br. at 9 n.3; Browning Br. at 11-12. This is sheer fantasy.

[5] Browning Br. at 8.

[6] Kelsoe Br. at 11.

[7] See, e.g., Kelsoe Br. at 12.

[8] The district court stated that *Rooker/Feldman* required it to focus exclusively on petitioner's claim "that an unfair trial was received *without regard to the validity* of Judge Walker's legal rulings and the outcome of the trial." (A38) (original emphasis; footnote omitted). Accordingly, the district court declined "to examine Judge Walker's rulings to determine which were harmless and which were reversible, causing damage." *Id.*

petitioner's argument that "'the merits of the state court proceedings are not at issue in this case' and that 'a substantive appellate review of the correctness of various rulings made by Judge Walker' will not be required." (A37).[9]

What remained, the district court observed (A37-38), was the prospect of proving, as in *Carey* v. *Piphus*, 435 U.S. 247 (1978), that the very denial of procedural fairness, apart from the substantive outcome, caused recoverable harm on these facts. If petitioner is able to show on remand that there was indeed a conspiracy of the sort alleged, and that the sham trial produced by that conspiracy caused harm apart from the judgment eventually entered, then, but for the *Parratt/Hudson*[10] theory of the courts below, petitioner would be given that opportunity.[11] The district court so held, and the decision of the Fifth Circuit was to the same effect. It was only *Parratt* and *Hudson* that blocked petitioner's path.

The decision below therefore cannot be supported on the alternative theory of no original jurisdiction. That theory would have required dismissing the complaint altogether, and would have prevented the courts below from ever reaching the *Parratt/Hudson* issue. Indeed, under that theory, this Court's post-*Rooker* decision in *Dennis* v. *Sparks* would have constituted

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[9] The district court specifically ruled that there was sufficient evidence extrinsic to the state courtroom proceedings to warrant a trial on the conspiracy claim — for example, evidence that Judge Walker had conducted ex parte meetings with respondents at which he had "announced the decision to submit jury issues on 'our' theory of the case" (A35).

[10] *Parratt* v. *Taylor*, 451 U.S. 527 (1981); *Hudson* v. *Palmer*, 468 U.S. 517 (1984).

[11] *See Carey, supra*, at 258-59, 264; *Memphis Community School Dist.* v. *Stachura*, 106 S.Ct. 2537, 2544 n.11 (1986). *See also id.* at 2546, 2547 (Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ., concurring) ("the violation of a constitutional right, in proper cases, may itself constitute a compensable injury" where damages are "reasonably quantifiable" and not based solely on the "inherent value of the right violated").

an impermissible exercise of jurisdiction. For there, as here, the federal plaintiffs sought damages for a conspiracy between private parties and a state judge to cause injury by "subverting the judicial process," 449 U.S. at 32. The conspiracy-induced injunction in *Dennis* was reviewed and "dissolved by a [state] appellate court" before the federal § 1983 action was even filed. *Id.* at 25. If respondents are correct, then the federal district court would have been without jurisdiction to entertain the anti-conspiracy suit in *Dennis* because that would have amounted to reviewing the state court judgment issuing the injunction. For this reason, the Fifth Circuit would have been obliged to direct dismissal of the *Dennis* complaint, and this Court would have had to so order.[12] Instead, this Court held that relief would lie.[13] If cases like *Dennis* v. *Sparks* are to be expelled from the lower federal courts on the ground that, despite *Carey* v. *Piphus*, someone who is denied a fair proceeding cannot seek damages caused by that denial of *fairness* as such, but must content himself with having the *outcome* of the proceeding reviewed and perhaps reversed, then that result should be decreed by this Court, after full briefing and argument — not by a circuit court, in an opinion that does not even address the question.[14]

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[12] *Cf. Bender* v. *Williamsport Area School District*, 106 S.Ct. 1326, 1331 (1986).

[13] It is immaterial that the only issue specifically addressed in *Dennis* was the "color of law" issue; if respondents were correct in their view of *Rooker/Feldman*, the problem would be jurisdictional.

[14] In any event, the Fifth Circuit's action in proceeding to reach and decide the *Parratt/Hudson* question was not made the basis for a cross-petition for certiorari by respondents, and therefore the *Rooker/Feldman* issue is not before this Court. The principle that the Court may affirm on any available ground is immaterial; if the district court indeed lacked subject matter jurisdiction, the Fifth Circuit's judgment affirming the district court's summary judgment in favor of respondents on the *Parratt/Hudson* question would have to be *vacated* on jurisdictional grounds, not affirmed.

II. RESPONDENTS' EFFORTS TO MAKE THIS CASE SEEM FACTUALLY OR PROCEDURALLY CONVOLUTED ARE TOTALLY EXTRANEOUS TO THE QUESTION PRESENTED.

When the question presented by a petition concerns access to the federal courts under § 1983 to vindicate the right to uncorrupted judicial process, this Court has not allowed its attention to be distracted by discussion of either the supposed merits of the underlying claim or the record of prior litigation on that claim. *See, e.g., Tower* v. *Glover,* 467 U.S. 914, 923 (1984). And the factual and procedural wrinkles elaborated by respondents here have nothing at all to do with whether the decision below is worthy of review and calls for reversal. Respondents' excuse for dumping all this material on the Court — replete with aspersions on petitioner's "latest wife, herself a convicted felon"[15] — is that the district court granted summary judgment for respondents rather than dismissing on the pleadings; "Holloway's pleadings," respondents say, "are not assumed to be true in an appeal from a summary judgment."[16]

That completely misses the point. The Fifth Circuit held — as a glance at its opinion will show (A8-16), and as the briefs in opposition expressly concede — that, under *Parratt* and *Hudson,* "the conduct between Judge Walker and the other defendants alleged" by Holloway "*failed to state a cause of action* under 42 U.S.C. § 1983 based on a denial of due process since process still existed in the form of an appeal."[17] Whether there was in fact a conspiracy, or what other proceedings transpired, is utterly immaterial to this holding. Thus there is

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[15] Browning Br. at 6 n.11.

[16] *Id.* at 2 n.3.

[17] Browning Br. at 10-11; Wright Br. at 8-9 (emphasis added); *see also* Kelsoe Br. at 7.

no relevant factual or procedural dispute bearing on the holding below that petitioner asks this Court to review.[18]

III. RESPONDENTS DO NOTHING TO RECONCILE THE JUDGMENT BELOW WITH A CENTURY OF FOURTEENTH AMENDMENT PRECEDENT AND WITH THIS COURT'S OWN NARROW READING OF *PARRATT* AND *HUDSON*.

Respondents repeat the Fifth Circuit's error of viewing Fourteenth Amendment jurisprudence as having begun with *Parratt/Hudson*, and therefore fail to explain how the holding below can possibly be squared with the entire corpus of due process and § 1983 case law. Respondent Kelsoe, for example, is perplexed by petitioner's reliance on *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U.S. 278 (1913), since that case "has [no] relevance to the determination of what constitutes due process for § 1983 purposes."[19] *Home Telephone's*

[18] The Browning brief mysteriously accuses petitioner of "repeatedly and erroneously suggest[ing]" that the Fifth Circuit's recognition of Judge Walker's immunity "is this current appeal." Browning Br. at 10 n.15. Petitioner suggests no such thing. Indeed, petitioner accepts and relies on the Fifth Circuit's judicial immunity ruling. See Petition at 6-7 & n.10, 14-15. Nor does this petition for certiorari have anything to do with the petition denied in *Humble Exploration Co.* v. *Browning*, 106 S.Ct. 1376 (1986). Although respondents quote parts of that petition dealing with due process and the Texas rule of election of remedies in order to make the preposterous suggestion that this Court has already decided the issue tendered to it here, see Browning Br. at 16-17 & n.18; Wright Br. at 7; Kelsoe Br. at 19 & n.8, respondents' own recitation of the procedural history of the prior petition, see Browning Br. at 7 n.13, and their quotation of the precise question presented therein, Wright Br. at 7 n.3; Browning Br. at 16; Kelsoe Br. at 19 n.8, make clear that the issues posed therein were entirely distinct — and indeed that the judgment challenged therein might well have been thought to rest on an adequate and independent state procedural ground.

[19] Kelsoe Br. at 15.

relevance, of course, is that it established the fundamental rule that a due process violation may be complete when a state agent abuses his power, notwithstanding the availability of state avenues for redress. Respondents, like the Fifth Circuit, seem not to appreciate the fact that *Parratt/Hudson* is but a narrow exception to that rule.[20]

The briefs in opposition effectively concede the need for plenary review by admitting that the Fifth Circuit's extraordinarily broad reading of *Parratt* and *Hudson* is in conflict with that adopted by other circuits.[21] Respondents deem this conflict unworthy of this Court's attention on the suppositions that the other circuits are wrong and that *Parratt/Hudson* compels the position taken by the court below. But respondents' own analysis of *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 105 S.Ct. 3108 (1985),[22] plainly shows that petitioner is correct in his far narrower reading of *Parratt* and *Hudson*. *Williamson County* held that a § 1983 claim that an uncompensated taking has occurred is "premature" until the landowner complaining of inverse condemnation "has used the

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[20] The brief of respondent Wright does not even mention *Home Telephone* or *Ex parte Virginia*, 100 U.S. 339 (1880), preferring instead, see Wright Br. at 19, to misread *Monell* v. *Dept. of Social Services*, 436 U.S. 658, 694 (1978), which dealt only with the question of whether a municipality may be *liable for damages* as a result of an agent's wrong that did not reflect any municipal "policy or custom." Nobody is seeking to hold Texas, or any Texas city or official, liable for damages in this case. Respondents Browning and Ayres seem to believe *Ex parte Virginia* is irrelevant because it is an old "habeas corpus case" dealing with "Negro . . . servitude," Browning Br. at 19-20. And they dismiss *Home Telephone*'s holding that even *unauthorized* abuse of state power violates Fourteenth Amendment due process as having been modified — seemingly, overruled — by this Court's reading of the Fifth Amendment Just Compensation Clause in *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 105 S.Ct. 3108 (1985)! See Browning Br. at 20.

[21] Browning Br. at 21; Wright Br. at 17-18; Kelsoe Br. at 20.

[22] See Browning Br. at 20.

[state-provided judicial] procedure and been denied just compensation." 105 S.Ct. at 3121. In finding this result "analogous to the Court's holding in *Parratt*," *id.*, this Court stressed the very point petitioner makes in his Petition at 19: there are some rights that simply are not violated unless and until the state refuses to provide a remedy. But not all procedural rights are of that character, and respondents offer literally nothing to support the stunning proposition — embraced by the judgment below — that the right to a fair trial is analogous to the right to just compensation in this respect.

If respondents were correct that the right to fair and impartial judicial process could be invoked only in this Court and only on direct review of a final state court judgment,[23] then it would follow that all § 1983 claims such as the one at bar and the one in *Dennis* v. *Sparks* would have to be dismissed for failure to state a claim, whatever the factual showing of conspiracy and deprivation.[24] More dramatically, respondents' theory would strip Congress of its remedial authority, under § 5 of the Fourteenth Amendment, to empower federal courts to redress

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[23] See Browning Br. at 15-17; Wright Br. at 15-16; Kelsoe Br. at 18.

[24] Respondents' reliance on *Tumey* v. *Ohio*, 273 U.S. 510 (1927), *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), and *In re Murchison*, 349 U.S. 133 (1955), for this proposition shows the fallacy of their reading of *Parratt/Hudson*. *See* Browning Br. at 14-15; Kelsoe Br. at 19. For if the Fifth Circuit and respondents were correct that a biased or otherwise corrupted state trial does not amount to a due process violation so long as the state provides an adequate post-deprivation remedy, then there would have been no due process violation in *Ward*, *Tumey or Murchison* — and hence no basis for this Court's appellate jurisdiction — since in each case the state provided an appellate remedy whose adequacy was never challenged. The fact that the *outcomes* of the state appeals in those cases did not satisfy the petitioners' wishes does not in any way suggest, much less prove, that those post-deprivation remedies were *procedurally* inadequate. In any event, as Justice Brennan wrote for the Court in *Ward*, a state trial cannot "be deemed constitutionally acceptable simply because the state eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." 409 U.S. at 61-62.

wrongs done under color of state law by those who conspire with state judges "to harass and injure individuals," *Mitchum* v. *Foster*, 407 U.S. 225, 240 (1972), so long as the state provides — as every state does — appellate review. How casually respondents, like the Fifth Circuit, overlook the Civil War and its aftermath.

Just last Term, this Court described the *Parratt/Hudson* line as distinguishing the commission of garden variety torts by state actors from "the sort of abusive government conduct that the Due Process Clause was designed to prevent." *Davidson* v. *Cannon*, 106 S.Ct. 668, 670 (1986). The court of appeals agreed that petitioner's complaint alleges just such abuse (A47), and the district court found that there was sufficient evidence, extrinsic to the state judgment and the rulings of the trial court (A37-38), to support the inference of a conspiracy between certain respondents and Judge Walker to harm petitioner (A35). Respondents have said nothing that changes *those* facts, or that justifies the decision below. The briefs in opposition thus do nothing to undermine petitioner's original submission that this case merits full briefing and argument, if not per curiam reversal.

Respectfully submitted,

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